

Crossing the line with off-duty online posts

Posts employees make online can potentially drag the employer into their affairs and warrant discipline or dismissal

BACKGROUND

Status update: You're in trouble

IT'S DIFFICULT to avoid social media and online interaction. Many employees check their personal emails and do some Internet surfing at work. Employers can regulate this with clear policies that set limits to the time and resources employees use so the employer isn't negatively affected.

However, sometimes the online activities of employees after hours can affect the employer as well. If an employee posts a comment or blog online that some people find offensive or affects other employees, and they can be identified as an employee of the company, there can be negative consequences to the employer's reputation and workplace. What can the employer do in such circumstances?

Employment lawyers Adrian Jackibchuk and Matthew Badrov help sort out the choices employers have open to them when an employee crosses the line while she's online and off-duty.

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COURTS and labour arbitrators have traditionally drawn a line between an employee's work and private life, declining to uphold discipline for "off-duty" conduct where there is no clear connection to the workplace. However, with the proliferation of online social media and the ease with which objectionable online comments can now be linked to the poster's employer, the line has begun to blur. This, in turn, is forcing employers to consider disciplining or even terminating employees who post offensive content, to protect the legitimate business interests of their organization.

While Canadian adjudicators have only just begun to set sail into these largely uncharted waters, it is becoming increasingly clear the crucial distinction between a posting that is

worthy of discipline and one that is not, is the extent to which the posting affects — or could affect — the workplace. If there is no connection to or discernible impact on the workplace, there will be little chance of upholding discipline. In determining this, adjudicators have considered factors such as the nature of the employment relationship, the nature and seriousness of the employee's conduct, the extent to which offensive content was publicly available and the impact — or potential impact — of that conduct on the employer's business and reputation.

A recent high-profile case

In the aftermath of the tragic suicide of British Columbia high school student Amanda Todd — who had endured online bullying and harassment — in October, a number of media outlets reported on the related termination of Justin Hutchings, an employee of a Mr.

Big & Tall Menswear store in London, Ont. After hearing of Todd's death, Hutchings, a man with no apparent connection to Todd, provocatively posted to Facebook the comment, "Thank God this b---- is dead."

A Calgary woman who had started a group to police Facebook comments about the deceased girl came across the offensive posting and when she clicked on Hutchings' Facebook profile saw the name of his employer. She reported the posting to the employer, who immediately terminated Hutchings' employment, purportedly because the posting was contrary to the values of the organization and Hutchings could be publicly identified as being its employee.

Was the termination justifiable in law?

What arbitrators have said

Arbitrators have upheld serious discipline for inappropriate social media postings even when there is a limited connection to the workplace, including in the following cases:

- In a blog in which he identified his employer, an employee posted hateful messages about East Indians and several comments supporting Nazism. Upon discovering the blog, the employer terminated the employee for cause. The arbitrator concluded that, while there was no evidence of actual harm to the employer, because the employer was named in the blog, there was a serious reputational risk to it. This justified the imposition of serious discipline, but not termination. In reaching this conclusion, the arbitrator

CASE IN POINT: OFF-DUTY CONDUCT

Reputational risk to employer can be enough for discipline

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considered the fact the comments did not directly target the employer or the employee's co-workers (some 40 per cent of whom were of East Indian descent) and the employee had shown remorse and sincerely apologized for his actions. Had the blog entries represented the employee's "considered and actual views rather than the reckless ranting of an emotionally impulsive young person," the arbitrator said, the termination would have been upheld.

•Although the employer had not suffered actual harm, an arbitrator ordered the "resignation" of an airline pilot who was terminated as a result of a Facebook posting with a connection to his employment. The employer was an airline owned by a number of First Nations and which primarily served clients from First Nations communities. Following his posting of a "top ten list" entitled, "You know you fly in the north when..." which was considered by his employer to be offensive and degrading to First Nations people, the pilot was fired, largely in light of the irreparable harm the posting could have caused the airline's business. The airline successfully argued the pilot's reinstatement, if ordered, would have had the potential to destroy the airline's customer base should the reason for the termination have become widely-known in the First Nations community. The arbitrator agreed, finding the airline had a "substantial and warranted" reputational concern in the event members of the

community it serviced became aware of the conduct in issue.

Tips for employers

While adjudicators continue to generate case law that should bring greater clarity to this evolving issue, it is important employers take steps to proactively address the new challenges the proliferation of online social media brings. To this end, remember the following.

Off-duty conduct may be considered misconduct if the conduct:

- Harms the company's reputation
- Makes it impossible for the employee to perform her duties satisfactorily
- Results in other employees refusing to work with the offending employee
- Makes it difficult for the company to carry on business efficiently.

It is always preferable to have policies that directly address social networking and blogs. Such policies should:

- Clearly outline the permitted and prohibited uses of social media
- Remind employees online communications may be read by anyone (including their employer, co-workers and members of the public)
- Reiterate the employee's duty of loyalty to the employer and any applicable policies concerning harassment, IT/computer use, conflicts of interest and privacy
- Prohibit employees from:
 - Using company-owned resources for social networking or blog activities (unless this type of social media is expressly allowed as legitimate

workplace activity, in which case there should be clear parameters to the activity)

- Disclosing confidential information, including information relating to other employees or customers
- Posting material that may violate the privacy rights of others
- Publishing negative comments, not only about the employer, other employees or customers or clients, but any comments that may negatively affect the employer's reputation
- Expressly warn employees that any breach of the policy may result in discipline up to and including termination, and advise employees if the employer monitors social networking sites.

Employers would also be well advised to:

- Monitor "cyberspace" to increase the chance of becoming aware of comments posted online that may negatively impact the company's business reputation or the workplace
- Should objectionable postings be identified, create electronic and hard-copy records of the postings to preserve potential evidence.

Employment law blog

Canadian Employment Law Today invites you to check out its employment law blog, where editor Jeffrey R. Smith discusses recent cases and developments in employment law. The blog includes a tool for readers to offer their comments, so discussion is welcome and encouraged.

Recent topics include reasonable notice limits, monitoring equipment use, disciplining employees for honest mistake, accommodating parental duties and disciplining supervisory employees.

You can view the blog on www.employmentlawtoday.com.



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